Suresh Emmanuel Abishegam & Anor v RHB Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1057 OF 2005
SURIYADI, HASAN LAH AND KANG HWEE GEE JJCA
4 AUGUST 2009

Banking — Banks and banking business — Loan secured by charge — Order for sale upon default in repayment — Whether interest rate contrary to terms of agreement — Whether interest rate unlawful — Whether cause to contrary established

Banking — Securities for advances — Certificate of indebtedness — Failure to state correct interest charged — Whether condition precedent for application for order for sale met — Whether constituted cause to the contrary

Land Law — Charge — Order for sale — Order for sale upon default in repayment — Whether interest rate contrary to terms of agreement — Whether interest rate unlawful — Whether cause to contrary established

The defendants charged the property under Hakmilik Strata PN6201 M11/5/5 Mukim Setapak Wilayah Persekutuan ('the property') to the plaintiff to obtain a housing loan. Under cl 4 of the loan agreement annexed to the charge, the rate of interest charged may be varied upon the plaintiff giving the defendants a notice of such variation in writing. Upon the defendants' default on the repayment of the loan, the plaintiff served on the defendants a notice of demand followed by the issuance of Form 16D and upon their failure to comply, commenced the present action for an order for sale under s 256 of the National Land Code. The judicial commissioner found that the omission by the plaintiff to comply with cl 4 did not in any way prejudice the defendants as in the ordinary course of business the defendants would have had notice of such a change from the monthly statements of account. The only issue raised by the defendants was whether the learned trial judge was right in not finding a cause to the contrary not to grant the order for sale on account of the failure of the plaintiff to serve the written notice. The defendants contended that the failure by the plaintiff to serve the notice pursuant to cl 4 constituted a non-compliance of O 83 r 3(3) read with r 3(6) of the Rules of the High Court 1980 ('RHC') and thus the plaintiff's application ought to be dismissed.

Held, allowing the appeal with costs:

(1) The affidavits disclosed a more serious irregularity in the plaintiff's

application than the mere failure of issuing the notice of variation. The notice of recall of housing loan and the subsequent statutory notice Form 16D stated that the interest due on the loan was based on the BLR of 6% + 3.5%pa contrary to the loan agreement which provided the interest chargeable was based on the flat rate of 10.25%pa. The claiming of interest due based on the BLR of 6% + 3.5%pa contrary to the terms of the loan agreement constituted an incorrect and unlawful claim and could not under the circumstances constitute a valid statement of the amount of interest legally due and owing as at the date the original summons was filed as required under O 83 r 3(3) of the RHC (see paras 12–13).

(2) The failure on the part of the plaintiff to state correctly the interest charged in its supporting affidavit in accordance with the term of the loan agreement under the circumstances was a failure to meet the condition precedent for the making of an application for an order for sale under category (ii) of *Low Lee Lian v Ban Hin Lee Bank* [1997] 1 MLJ 77 that an order for sale ought not to have been granted. Had a valid certificate been provided under the rule in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 or *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, the question of requisite notice of the change in interest rate would be insignificant (see para 14).

Observation

Where an order for sale is refused only on the ground that a condition precedent to O 83 r 3(3) of the RHC is not met, the application could not be treated as being heard on the merit; and as such it is open to the chargee to begin the originating summons anew to be supported by a proper affidavit alluding correctly to the particulars required under O 83 r 3(3).

[Bahasa Malaysia summary

Defendan-defendan menggadaikan harta di bawah Hakmilik Strata PN6201 M11/5/5 Mukim Setapak Wilayah Persekutuan ('harta tersebut') kepada plaintif untuk mendapatkan pinjaman perumahan. Di bawah klausa 4 perjanjian pinjaman yang dilampirkan bersama gadaian, kadar faedah yang dikenakan boleh diubah apabila plaintif memberi defendan-defendan notis bertulis mengenai variasi tersebut. Apabila defendan-defendan gagal membuat pembayaran balik pinjaman tersebut, plaintif telah menyampaikan kepada defendan notis tuntutan diikuti dengan pengeluaran Borang 16D dan apabila mereka gagal mematuhinya, telah memulakan tindakan ini untuk perintah jualan di bawah s 256 Kanun Tanah Negara. Pesuruhjaya kehakiman mendapati bahawa kegagalan plaintif untuk mematuhi klausa 4 tidak sama sekali memprejudis defendan-defendan memandangkan dalam urusan biasa perniagaan, defendan seharusnya sedar akan perubahan tersebut daripada penyata akaun bulanan. Satu-satunya isu yang dibangkitkan oleh

defendan-defendan adalah sama ada hakim bicara yang bijaksana adalah betul dengan tidak mendapat sebab untuk memberikan perintah jualan berdasarkan kegagalan plaintif untuk menyampaikan notis bertulis tersebut. Defendan-defendan berhujah bahawa kegagalan plaintif untuk menyampaikan notis mengikut klausa 4 membentuk ketidakpatuhan A 83 k 3(3) dibaca bersama k 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan oleh itu, permohonan plaintif seharusnya ditolak.

Diputuskan, membenarkan rayuan dengan kos:

(1) Afidavit-afidavit menunjukkan luar aturan yang lebih serius di dalam permohonan plaintif berbanding kegagalan semata-mata untuk mengeluarkan notis variasi. Notis untuk menarik balik pinjaman perumahan dan selanjutnya notis statutori Borang 16D menyatakan bahawa faedah yang perlu dibayar bagi pinjaman adalah berdasarkan BLR 6% + 3.5% setahun berlawanan dengan pinjaman perumahan yang mana memperuntukkan faedah yang dikenakan adalah berdasarkan kadar rata 10.25% setahun. Tuntutan bagi faedah yang perlu dibayar berdasarkan BLR 6% + 3.5% setahun yang berlawanan dengan terma-terma pinjaman perumahan membentuk tuntutan yang tidak betul dan menyalahi undang-undang dan tidak boleh, dalam keadaan ini, membentuk pernyataan jumlah faedah yang perlu dibayar dan terhutang yang sah memandangkan pada tarikh tersebut, saman asal telah difailkan seperti yang dituntut di bawah A 83 k 3(3) KMT (lihat perenggan 12–13).

(2) Kegagalan bagi pihak plaintif untuk menyatakan dengan betul faedah yang dikenakan di dalam afidavit sokongannya mengikut terma perjanjian pinjaman dalam keadaan ini adalah kegagalan untuk mematuhi syarat duluan untuk membuat permohonan bagi perintah jualan di bawah kategori (ii) *Low Lee Lian v Ban Hin Lee Bank* [1997] 1 MLJ 77 bahawa perintah jualan tidak seharusnya diberikan. Sekiranya sijil yang sah telah disediakan di bawah peraturan *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 atau *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, persoalan tentang notis yang diperlukan bagi perubahan dalam kadar faedah adalah tidak penting (lihat perenggan 14).

Pemerhatian

Di mana perintah jualan dinafikan semata-mata atas alasan bahawa syarat duluan kepada A 83 k 3(3) KMT tidak dipatuhi, permohonan tidak seharusnya dianggap telah didengar atas merit; dan oleh itu, penerima gadaian boleh memulakan semula saman pemula yang mana disokong oleh afidavit yang menyatakan dengan betul butiran-butiran yang diperlukan di bawah A 83 k 3(3).]

Notes

For a case on certificate of indebtedness, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2104.

For cases on loan secured by charge, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1988–1990.

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2376–2520.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608, HC (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, FC (folld)

Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd [2003] 4 MLJ 409, CA (refd)

Legislation referred to

National Land Code ss 256, 256(3) 257, 271, 340, Form 16D
Rules of the Court of Appeal 1994 r 7(3A)
Rules of the High Court 1980 O 83 r 3(3), (6)

Appeal from: Originating Summons No S4–24–2369 of 2004 (High Court, Kuala Lumpur)

Felix Dorairaj (Dorairaj, Low & Teh) for the appellants.
Annou Xavier (Lee Swee Seng and Teo Lee Wei with him) (Lee Swee Seng & Co) for the respondent.

Kang Hwee Gee JCA:

[1] This is an appeal by the defendants against the decision of the learned judicial commissioner of the High Court Kuala Lumpur granting the plaintiff an order for sale of a property Hakmilik Strata PN6201 M11/5/5 Mukim Setapak Wilayah Persekutuan under ss 256, 257 and 271 of the National Land Code.

[2] The property was charged to the plaintiff by the defendants to obtain a housing loan for the principal sum of RM51,000 at an interest rate of 10.25%pa on yearly rests. Under cl 4 of the loan agreement annexed to the charge, the rate of interest charged may be varied but the plaintiff is required to give the defendants a notice of such variation in writing.

[3] The defendants defaulted on the repayment of the loan. Consequently, the plaintiff served on the defendants a notice of demand on 5 April 2004 followed later by the issuance of Form 16D and upon their failure to comply, commenced the present action for an order for sale under s 256 of the National Land Code before the High Court.

[4] It was common ground at the hearing before the High Court that there was a reduction of the rate of interest from 10.25% to 9.50% at a certain period of currency of the loan. But the plaintiff was unable to produce the written notice of variation of interest rate that it imposed on the defendants although this was raised as an issue in para 14 of the affidavit in reply of the defendants dated 24 March 2005. The written notice is a term under cl 4 of the loan agreement under which the plaintiff was bound to provide. It may be noteworthy for future guidance to mention here that in blatant contravention of the rule in *Ladd v Marshall* [1954] 3 All ER 745 and r 7(3A) of the Rules of the Court of Appeal 1994 the plaintiff only attempted to introduce without leave of the court through an affidavit in this appeal that it had subsequently discovered that such notices of variation had indeed been served on the defendants, an excuse which we must at once reject.

[5] Now, cl 4 of the loan agreement which states:

> Notwithstanding the provisions relating to the rate of interest as hereinbefore provided the Lender shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the Chargor(s) of such its intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

[6] The learned judicial commissioner of the High Court found the omission by the plaintiff to comply with cl 4 had not in any way prejudiced the defendants as in the ordinary course of business the defendants would have had notice of such a change from the monthly statements of account that the plaintiff sent to the defendants. She allowed the plaintiff's application and granted the order for sale.

[7] In the appeal before us the defendants confined their submission to only the issue whether the learned trial judge was right in not finding a cause to the contrary not to grant the order for sale on account of the failure of the plaintiff to serve such a written notice.

[8] The law is now well settled. To successfully resist an action for an order for sale under s 256 of the National Land Code it is incumbent upon the

chargor to satisfy the court that there is cause to the contrary to refuse an order for sale. The scope within which the court may find *cause to the contrary* to refuse an order for sale is now defined in the Supreme Court case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36 and the many cases that followed it where 'cause to the contrary' in s 256(3) of the National Land Code was narrowed down to three categories:

(a) where the chargor is able to successfully impeach the chargee's title to the charge to any of the grounds provided in s 340 of the Code;

(b) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order for sale;

(c) where to grant an order for sale would contravene some rule of law or equity.

[9] Before us the defendants contend that cl 4 requires a substantive notice to be served and that for the purpose of cl 4 it could not be presumed that such a notice had been issued in its ordinary course of business as the learned judge had done. A failure on the part of the plaintiff to serve the notice, it is submitted, constitutes a non-compliance of O 83 r 3(3) read with r 3(6) of the Rules of the High Court 1980 which should result in the dismissal of the plaintiff's application. Rule 3(3) provides that:

> Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of —
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge.

[10] And r 3(6) provides that:

> Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

[11] The defendants relied on the Court of Appeal decision in *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409, a case where the supporting affidavit of the chargee bank failed to state the base lending rate ('BLR') it imposed on the defendant. It was held that the court was in no position to take judicial notice of the BLR charged by the bank as

different banks had different BLR and that a failure on the part of the bank to state the BLR applicable at the time when the charge instrument was executed had left the borrower in the dark as to the actual interest rate charged. It held that the omission did not comply with O 83 r 3(3) of the Rules of the High Court 1980 and this was fatal to an application for an order for sale.

[12] A close examination of the supporting affidavit dated 25 October 2004 and the subsequent affidavit in reply dated 11 May 2005 of the assistant general manager of the plaintiff Choo Chooi Yan however, discloses a more serious irregularity in the plaintiff's application than the mere failure of issuing the notice of variation. The notice of recall of housing loan dated 5 April 2004 and the subsequent statutory notice Form 16D stated that the interest due on the loan was based on the BLR of 6% + 3.5%pa contrary to the loan agreement which provides the interest chargeable was based on the flat rate of 10.25%pa. The agreement it is clear does not make BLR as the base from which the rate of interest is to be added to, subtracted from or varied as is commonly found in loan agreements of financial institutions.

[13] It follows therefore, claiming interest due based on the BLR of 6% + 3.5%pa contrary to the terms of the loan agreement constitutes an incorrect and unlawful claim and could not under the circumstances constitute a valid statement of the amount of interest legally due and owing as at the date the original summons was filed as required under O 83 r 3(3).

[14] We are unanimous in our view that a failure on the part of the plaintiff to state correctly the interest charged in its supporting affidavit in accordance with the term of the loan agreement under the circumstances is a failure to meet the condition precedent for the making of an application for an order for sale under category (ii) of *Low Lee Lian* that an order for sale ought not to have been granted. Had a valid certificate been provided under the rule in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 or *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 the question whether the requisite notice of the change in interest rate would be insignificant. There would be little in the way that the order for sale could be resisted.

[15] Given the unsatisfactory manner in which the application was presented at the High Court we are constrained to allow the appeal with costs.

[16] We must however add a rider to remind the parties that where an order for sale is refused only on the ground that a condition precedent to O 83 r 3(3) of the Rules of the High Court 1980 is not met, the application cannot be treated as being heard on the merit; and as such it is open to the chargee to begin the originating summons anew to be supported by a proper affidavit

alluding correctly to the particulars required under O 83 r 3(3). As Gopal Sri Ram JCA was minded to say of category (ii) in *Low Lee Lian* above:

> However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Appeal allowed with costs.

Reported by M Sivabarathi